ERIC

The ERISA Industry Committee

April 29, 2013

CC:PA:LPD:PR (REG-138006-12)
Internal Revenue Service
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: REG-138006-12, RIN 1545-BL33
(Shared Responsibility for Employers)

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to respond to the request of the Internal Revenue Service and Treasury Department (collectively, the "Agencies") in REG-138006-12, RIN 1545-BL33 for comments regarding comprehensive proposed regulations ("proposed regulations") under section 4980H of the Internal Revenue Code. Section 4980H codifies the employer shared responsibility provisions under the Patient Protection and Affordable Care Act ("ACA").

ERIC submitted comments on the general rules in the proposed regulations on March 18, 2013. At that time we reserved the issue of the impact of the proposed regulations on service contract employees. This second comment letter supplements our first letter of March 18, 2013, by addressing the issue of service contract employees.

ERIC's Interest in the Shared Responsibility Requirements

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, and other welfare benefits of America's largest employers. ERIC's members sponsor some of the largest private group health plans in the country. These plans provide health care to millions of workers and their families.

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Special rules are needed for service contract employees

Background[1]**:** The McNamara-O'Hara Service Contract Act of 1965 (SCA)[2], applies to every contract entered into by the United States or the District of Columbia, the principal purpose of which is to furnish services in the United States through the use of service employees. Contractors and subcontractors performing on such federal contracts must observe minimum wage and safety and health standards, and must maintain certain records, unless a specific exemption applies.

Every service employee performing any of the Government contract work under a service contract in excess of $2,500 must be paid not less than the monetary wages, and must be furnished fringe benefits, which the Secretary of Labor has determined to be prevailing in the locality for the classification in which the employee is working. Every covered contract in excess of $2,500 contains a provision specifying the fringe benefits to be furnished to service employees and must be paid in addition to the minimum wage. Fringe benefits are required to be provided separate from, and in addition to, the specified minimum hourly rate provided on the wage determination.

Unless otherwise specified on the applicable wage determination, health and welfare payments are due for all hours, including paid vacation, sick leave, and holiday hours, up to a maximum of 40 hours per week and 2, 080 hours per year on each contract.

Fringe benefit obligations may be discharged by paying to the employee on his regular payday, in addition to the monetary wage required, a cash amount per hour in lieu of the specified fringe benefits, provided such amount is equivalent to the cost of the fringe benefits required. Records are kept separately showing the amounts to be paid for fringe benefits.

Effective June 17, 2012, the prevailing health and welfare fringe benefits issued under the SCA were increased to $3.71 per hour (or $643.07 per month). [3]

In the June, 2012 memorandum issued by the Wage and Hour Division (WHD) of the Department of Labor[4], the WHD concludes that employer contributions that are made to satisfy the employers' obligations under the Hawaii mandated prepared Health Care Act may not be credited toward meeting the employer's obligations under the SCA. The SCA does address this dual payment issue, however, by excluding the health insurance portion from the employer's obligations under the SCA. Thus, instead of a fringe benefit obligation of $3.71 per hour, the mandated SCA health and welfare fringe benefits level for Hawaii is generally set at $1.50 per hour.

Impact of the ACA[5]: The ACA provides that applicable large employers may face one of two "shared responsibility" penalties under section 4980H of the Internal Revenue Code of 1986.[6]

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[1] United States Department of Labor, Wage and Hour Division, Frequently Asked Questions, at http://www.dol.gov/compliance/laws/comp-sca.htm#factsheets.
[2] 41 U.S.C. §§ 351–358.
[3] All Agency Memorandum Number 211, dated June 11, 2012, from Nancy Leppink, Deputy Administrator, Wage and Hour Division, the Department of Labor.
[4] All Agency Memorandum Number 211, dated June 11, 2012, from Nancy Leppink, Deputy Administrator, Wage and Hour Division, the Department of Labor.
[5] This explanation of the shared responsibility provisions of the ACA is based on Prop. Treas. Reg. § 54.4980H.
[6] All references are to the Internal Revenue Code of 1986, as amended, unless otherwise noted.

Under section 4980H(a), if an applicable large employer fails to offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage, the employer must pay an excise tax equal to 1/12 of $2,000 per month times the number of its full-time employees in excess of 30, provided that at least one full-time employee receives a premium tax credit or cost-sharing reduction through a state exchange.

Under section 4980H(b), if an applicable large employer offers minimum essential coverage, but the coverage is not affordable or does not meet the minimum value standard, the employer must pay an excise tax equal to 1/12 of $3,000 per month times the number of its full-time employees who receive a premium tax credit or cost-sharing reduction through a state exchange. This excise tax is capped so that it does not exceed the section 4980H(a) liability that would have applied if the employer did not offer coverage.

The proposed regulations provide that an employee may go to a state exchange and potentially receive subsidized coverage if the cost of the self-only premium of the employer's lowest-cost plan is considered unaffordable because it exceeds 9.5% of the employee's household income or if the employer's plan does not meet the requisite "minimum value" standard.

Key issue: To fulfill their obligation to meet the statutory requirements of the SCA with respect to the payment of fringe benefits, including health coverage, employers with service employees generally must pay at least $643.07 per month, or $7716.84 per year, to those service employees who work full time. For the vast majority of service employees, this amount of $643.007 per month exceeds the cost of the self-only premium for the employer's lowest-cost plan.

Some employers fulfill this obligation by providing these service employees with health coverage and other fringe benefits, and in other cases the amount is paid to the employees in cash. Payment as cash is often valued by those employees who have health coverage elsewhere; payment in the form of mandated health coverage would result in duplicative coverage for these employees and, thus, would not represent a desirable outcome for them.

The ACA and the proposed regulations under the shared responsibility provisions are silent on how an employer may treat this SCA-mandated fringe benefit payment with respect to the employer liability provisions. Thus, it is not clear that the amount an employer pays to offset the fringe benefit obligations under the SCA may be taken into consideration when determining whether the employer has offered minimum essential coverage to a service employee and whether the employer's group health plan may be considered "affordable" to the employee in light of this fringe benefit payment. This is true even though the $7716.84 per year annual payment mandated under the SCA for full-time employees would in most cases completely offset 100% of the total premium paid by the employee and the employer for self-only coverage.

Employers should not be put in the unfair and untenable position of paying "twice" for health care coverage for their service employees: once pursuant to the fringe benefit payment provisions of the SCA, and once by virtue of the significant additional penalty potentially triggered by full-time service employees who have received the SCA-mandate fringe benefit payment in cash and have chosen not to be covered by the employer's plan. These employees potentially could trigger either the penalty under section 4980H(a) for failure to provide minimum essential coverage, or the penalty under section 4980H(b) for failure to provide affordable coverage.

Recommendation: ERIC thus strongly recommends that employers with service employees with respect to whom they are in compliance with the health and welfare fringe benefit determinations of the SCA should not be determined to be liable for either the penalty under section 4980H(a) or (b), provided that: 1) the employer has made minimum essential health coverage available to these employees for the periods covered by the SCA determinations; and 2) the amount the employer pays in cash or for other health and welfare benefits to or on behalf of employees as the SCA-mandated fringe benefit payment would be considered to constitute "affordable" coverage if it were considered an employer contribution to the employer's lowest-cost health plan for which the employee is eligible.

ERIC appreciates the opportunity to comment on this aspect of the shared responsibility rule in the proposed regulations. If the Agencies have any questions concerning our comments, or if we can be of further assistance, please contact us at (202) 789-1400.

Sincerely,

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President & CEO

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Senior Vice President, Health Policy